UNITED STATES
v.
A. B. FLEMING ET AL. 1/

IBLA 75-215 Decided April 24, 1975

Appeal from decision of Administrative Law Judge Robert W. Mesch holding that the Sam Hall Nos. 1, 2 and 3 lode mining claims are null and void. Contest NM-290.

Affirmed.

1. Administrative Procedure: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Res Judicata--Rules of Practice: Government Contests

The doctrine of res judicata will not bar an administrative proceeding to determine the validity of three unpatented mining claims where, in a previous condemnation action for the War Department's taking of a temporary exclusive easement covering the claims, the judgment of the federal district court was limited solely to the compensation to be paid by the United States, and there was no litigation of the issue of the validity of the claims and no prior adjudication of that issue in the Department of the Interior.

2. Administrative Procedure: Generally--Equitable Adjudication: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Rules of Practice: Government Contests

1/ Robert B. Fleming, Dorothy D. Fleming, Mina Davis Gilliland, and Ola M. Wood

Equitable estoppel will not operate to bar a mining claim contest or alter its result where it is not shown that some officer of the Government, who was authorized to declare the claims valid, falsely misrepresented to, or concealed material facts from the claimants concerning the validity of the claims with the intention that the claimants should act in reliance thereon, with the result that the claimants were thereby induced to do so, to their ultimate damage.

3. Administrative Procedure: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Res Judicata--Rules of Practice: Government Contests

The doctrine of collateral estoppel will not bar the administrative contest of the validity of three mining claims which were the subject of a previous condemnation action for the taking by the Government of a temporary exclusive easement over the claims, where the issue of the validity of the claims was not actually litigated and it was wholly unnecessary for the Court to adjudicate that issue in rendering its judgment.

4. Administrative Procedure: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Rules of Practice: Government Contests

The Department of the Interior has jurisdiction, in proper proceedings, to determine the validity of mining claims on federal lands.

5. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery

Where a mining claim occupies land which has subsequently been withdrawn from the operation of the mining law, the validity of the

> claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as the date of determination. If the claim was not supported at the date of the withdrawal by a qualifying discovery of a valuable mineral deposit, the land within its boundaries would not be excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit thereafter increased due to a change in the market.

APPEARANCES: Norman S. Thayer, Esq., Sutin, Thayer & Browne, Albuquerque, New Mexico, for the appellants; Gayle E. Manges, Esq., Field Solicitor, Department of the Interior, Santa Fe, New Mexico, for the United States.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

An understanding of the history of these claims is essential to an appreciation of their present status and the issues presented by this appeal. Location notices for the Sam Hall Nos. 1, 2, and 3 lode mining claims were filed on different dates in December 1940. The claims are located in sections 9 and 10, T. 12 S., R. 5 E., N.M.P.M., Sierra County, New Mexico.

By Executive Order No. 9029 of January 20, 1942, all of the public land within the township was withdrawn from all forms of appropriation under the public land laws, including the general mining law, and reserved for use of the War Department as a general bombing range. The withdrawal was, of course, subject to valid existing rights.

On August 16, 1943, an examination of all three claims was conducted by Louis C. Mackel, Field Examiner, employed by the General Land Office 2/, and Mining Engineer - Appraisers Eric Kraemer and Neil A. McGill 3/ of the War Department, in company

---

2/ The General Land Office of the Department of the Interior was the forerunner of today's Bureau of Land Management.

3/ McGill died in the interim between his examination of the claim on August 16, 1943, and Kraemer's report of October 8, 1943. It is not shown that McGill's findings are incorporated in Kraemer's report.

with the lessee of the claims. Mackel's reports as to each claim concluded, "* * * it appears that this claim has a valid discovery of mineral and that adverse proceedings are not warranted." Kraemer, however, by using estimated shipping costs, which he stated were low, calculated that a shipment from the mine ore dump would yield a net profit to the shipper of $0.59 per ton, or $59.00 for the entire 100 tons contained in the dump. This hypothetical calculation was based entirely on a shipment of ore 4/ from the dump, and did not take into account the cost of mining it. Moreover, Kraemer's report noted that, "Obviously, however, it would be unwise to ship this ore on such a small expected margin of profit. Therefore, the dump ore is ignored as an item of ore reserves." As for the ore in place in the discovery tunnel and on the surface, Kramer reported that he ignored it as an ore reserve for the same reason that he ignored the dump ore, noting that a projected shipment of the ore in place would result in "an indicated loss amounting to approximately the cost of mining the ore." The Reviewing Appraiser, Office of the Chief of Engineers, in approving Kraemer's recommended easement rental of $550 per annum, included the following observation:

> Scant justification is given in this report for any value on these claims other than as a prospect, since even an optimistic analysis of "ore in sight" would indicate the mining of the orebody as an unprofitable operation.

In his letter of September 29, 1943, to the Secretary of War, Oscar Chapman, then Assistant Secretary of Interior, listed the subject claims among others, "which are reported to be valid by a representative of this Department," an apparent reference to Mackel's report.

The land was included in what was then known as the Almagorado Bombing Range and, more recently, as the White Sands Missile Range.

In February 1946, the claims were again examined, this time by Mining Engineer - Appraiser Adolph S. Walter, a War Department employee. Walter's report (Ex. F) stated that the claims had been classified as valid by the Interior Department, and his purpose was to appraise the value of the condemned interest. Walter's report was the most optimistic of all concerning the potential worth of the claims as mining properties. He stated that the vein on the

---

4/ The term "ore" is loosely used throughout the record to refer to the mineralized material on the claim rather than being confined to the technical definition, which applies that term only to material which is susceptible to being mined at a profit.

Sam Hall No. 3 could be traced for 1,600 feet by means of shallow open cuts. He noted that the minerals were strategic and that premium prices and bonuses were available to producers and that these claims could have qualified, and that with these extra wartime incentives, "the mine could have been made to pay a small profit per ton."

Condemnation proceedings were initiated on behalf of the War Department to acquire a temporary exclusive easement covering the claims. United States v. 1,267,200 Acres of Land, etc., Civil Action No. 394 (D. N.M., judgment filed June 4, 1946) (Ex. H). The Court entered judgment based upon a stipulation agreed to by the parties regarding the terms of use and the amount of compensation to be paid (Ex. G). The judgment provided for an initial term beginning on January 30, 1942, and running to June 30, 1946, "* * * extendible for yearly periods thereafter during the national emergency." Thereafter, the claimants were paid compensation in accordance with this judgment.

In 1970, the United States brought a new action in condemnation for use of the lands in connection with the White Sands Missile Range for a one-year term renewable on a year to year basis at the option of the United States until June 30, 1980. United States v. Certain Mining Claim Tracts, etc., Civ. No. 8571 (D. N.M.).

Having initiated this suit, the United States then moved the Court for an order suspending the issue of just compensation for the claims until the validity of such claims could be determined by proper administrative proceedings (Ex. 5). The claimants, defendants in this litigation, filed a response in opposition to this motion, asserting to the Court that the Bureau of Land Management had already determined the claims to be valid in 1943, and that the issue of the claims' validity was litigated and decided in the prior condemnation suit (supra), so that the Government was thereafter barred by the doctrines of collateral estoppel and res judicata from raising any question as to their validity (Ex. 4). The Court, having considered the briefs and arguments of counsel, granted the Government's motion and suspended action on the issue of compensation pending the determination of the validity of the claims in proper administrative proceedings (Ex. 8).

After re-examination of the claims by both sides a contest complaint issued, charging that the claims are invalid because:

a) valuable minerals did not exist on the claims at the time of withdrawal on January 20, 1942, so as to constitute a valid discovery within the meaning of the mining laws.

b) valuable minerals do not now exist within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

Evidence adduced at the hearing establishes that several recent examinations of these claims have been conducted by persons expert in the fields of geology and mining engineering.

John Goldenstein, a geologist and mining engineer employed by the Bureau of Land Management, testified that he examined the claims on six occasions during 1973 and 1974, taking nine samples which were assayed. He calculated values, costs, tonnages and other relevant considerations as they were in the 1941-42 era and as they are currently. Although the assays indicated the presence of lead, silver and zinc, Goldenstein said the values were too law to offset the high cost of transportation involved in the direct shipment of ore to the smelter. The only way this ore could be prudently or profitably worked, he said, would be to build a mill at the claim-site and concentrate the ore prior to shipment. However, he was firmly of the opinion that there was an insufficient quantity of ore on the claims to justify the purchase, installation and operation of a mill, either in 1942 or at present.

Vincent C. Kelley was a witness. He holds a Ph.D in geology and has a strong background in that field as a consultant, professor, author and mining executive. He examined the claims on two occasions under contract with the Corps of Engineers. Assays of his samples corresponded well with those taken by Goldenstein. Kelley's opinion was that the amount of mineralized material on the claims was much too small to warrant development of a mine, even if there were twice as much ore as he projected by geological inference. His opinion was that a prudent man would not have been justified in expending time and effort on the claims with a reasonable prospect of developing a paying mine, either now or in 1941. He stated that the amount of ore on the claims would not "be large enough to much more than pay for the necessary road work and possibly the mining of that small amount of ore that's left." (Tr. 99). He would not even recommend a program of exploratory drilling to a client, and he would not have done so in 1941 (Tr. 101, 102).

Philip W. Beckley, a consulting geologist with expert qualifications, testified for the contestee. He had examined the claims in 1971 and 1972, and had also taken samples. While Beckley's findings did not differ appreciably from Goldenstein's and Kelley's, Beckley's interpretation of the geology and the inferences to be drawn therefrom were at some variance with theirs. For example,

Kelley was of the opinion that there is no continuity between the vein exposures on the Sam Hall No. 2 and the Sam Hall No. 3, saying, "* * * I say 99% or more is certain that there is no continuity" (Tr. 112). Beckley, on the other hand, disagrees, saying, "I think it has a different type and perhaps would give it a considerably higher percentage of possibility of connecting between the outcrops." (Tr. 136). He further elucidated, stating:

> Well, I think that the -- my opinion is only from the fact that you may form an opinion, as has been pointed out by your experience with this type of properties. I would not agree with the one (1%) per cent possibility that it goes through, nor would I make it a hundred (100%) per cent possibility that it must go through. Somewhere between lies the truth. The truth could be had by -- otherwise, I think there perhaps is a forty (40%), forty-five (45%) per cent possibility that it is extendable through the mountain in either blocks -- continuous blocks, fractures, veins, -- not as a continuous mass, but the method of computation uses a hundred (100%) per cent throw away value from the volume that comes out. I've given a fifty (50%) per cent reduction of the volume calculated by my figures. For discontinuity. (Tr. 159).

He agreed "100%" with Goldenstein's opinion that the really crucial factor is whether there is a sufficient ore body to warrant building a mill at the site of the mine (Tr. 174). However, Beckley would advise the owners to conduct an exploratory drilling program, after which, he said, "We would not use our original outcrop values, but as we diamond drilled the mineralized structure, which we hypothetically would find, then we will put a figure to it, and it would be a calculation of water, mill, freight, and all the other things that go into it." (Tr. 170)

The Administrative Law Judge found, on the basis of all the expert testimony, that a valuable mineral deposit has not been found within the limits of any one of the three claims. In arriving at this finding he applied the following principles of law (Dec. pp. 8 and 9).

> In order for a mining claim to be valid, there must be an actual physical finding of a valuable mineral deposit within the limits of the claim. A valuable mineral deposit is an occurrence of mineralization of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of his labor and means in the development of a mine and the extraction of the mineral. The mineral deposit that has been found must have a present value for mining purposes. The test

is whether the facts warrant the development or actual mining of the property and not whether the facts warrant prospecting or exploration in an attempt to ascertain whether the property should be developed. See Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Coleman, 390 U.S. 599 (1968); Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir., 1969), Barton v. Morton, 498 F.2d 288 (9th Cir., 1974); United States v. James P. Rigg, Jr., et al., 16 IBLA 385 (1974).

A discovery on one claim will not support rights to another claim or group of claims even though the claims are contiguous. A valuable mineral deposit must be found within the limits of each claim. See United States v. Joseph A. Schelden et al., A-29078 (April 26, 1963); United States v. Frank Melluzzo et al., 76 I.D. 181 (1969); United States v. J. L. Block, 12 IBLA 393, 80 I.D. 571 (1973).

Where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the validity of the claim cannot be recognized unless the claim was supported by a valid discovery at the time of the withdrawal. See Cameron v. United States, supra; United States v. C. F. Snyder et al., 72 I.D. 223 (1965), aff'd 405 F.2d 1179 (10th Cir., 1968); United States v. Warren E. Wurts et al., 76 I.D. 6 (1969); United States v. A. P. Jones, 2 IBLA 140 (1971).

Even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claims cannot be considered valid unless the claim is presently supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location. See Gwillim v. Donnellan, 115 U.S. 45 (1885); Mulkern v. Hammitt, 326 F.2d 896 (9th Cir., 1964); United States v. Menzel G. Johnson, 16 IBLA 234 (1974); United States v. Gunsight Mining Company, 5 IBLA 62 (1972).

When the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case and the burden then shifts to the mining claimant

to show by a preponderance of the evidence that the claim is valid. See Foster v. Seaton, 271 F.2d 836 (D.C. Cir., 1959); United States v. Howard S. McKenzie, 4 IBLA 97 (1971); United States v. New Jersey Zinc Company, 74 I.D. 191 (1967).

In his decision, Judge Mesch specifically rejected the contestees' contention that this action is barred under the doctrine of res judicata, finding that this argument had been presented to and considered by the District Court in granting the Government's motion. Judge Mesch construed the Court's order as representing the conclusion of the Court that the validity of the claims had not been determined in prior proceedings so as to preclude further inquiry. Moreover, in his independent analysis of the issue, Judge Mesch held that res judicata does not constitute a bar to this action.

He also considered and rejected the contestee's argument that the United States is estopped to assert the invalidity of the claims, having treated them as valid for 30 years.

Judge Mesch concluded that the claims are null and void because none of them was perfected by a discovery of a valuable mineral deposit in 1942 when the land was withdrawn from operation of the mining laws, and they are not presently supported by discoveries of valuable mineral deposits.

Appellants, in their statement of reasons for appeal and supporting briefs, revive each of the issues dealt with in the contest proceeding, alleging that the Administrative Law Judge erred in (1) failing to hold that this proceeding was barred by the doctrine of res judicata; (2) failing to hold that the Government was estopped by its prior determination that the claims were valid, reliance on that determination by the appellants, and the prejudice to their position by the passage of time, death of witnesses, and loss of other evidence; (3) holding that the claims are void for lack of discovery at the date of withdrawal and at the time of the hearing.

[1] Although the Administrative Law Judge interpreted the Court's order as a finding that the doctrine of res judicata was not a bar to this proceeding (which, in our opinion he was entitled to do), he did not foreclose consideration of the defense on that basis. Instead, he received evidence, heard arguments and received briefs on the matter, and reached an independent conclusion that res judicata was not applicable. We agree.

There was no prior litigation of the issue of the claims' validity, either in the courts or by quasi-judicial administrative procedures. 5/ The Government merely elected to treat the claims as valid for the purpose of permitting an exclusive easement to be acquired thereon for a specific term of years, based upon the recommendation of an employee. This election to simply treat the claims as valid for a limited purpose over a limited time cannot be characterized as res judicata - "A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." Black's Law Dictionary, 4th Ed.

The significance of the limited term of the taking was emphasized by the Court in United States v. Johnson, 420 F.2d 955, 957 (9th Cir. 1970) in holding that the doctrine of res judicata is inapplicable in a situation involving successive condemnation proceedings, each taking the property for a term of years, saying:

> The causes of action were different because the term of each taking was for a different period in time. * * * Although the land and the parties are the same, the period in time, involved in the third taking is a different and changed circumstance. (Emphasis by the Court.)

Appellant maintains that when the Court entered judgment for just compensation in the 1946 condemnation action, that court necessarily found that the claims were valid and valuable, and that this constituted the prior judicial determination upon which the defense of res judicata is properly grounded. They argue that the decision of the Administrative Law Judge has the effect of reversing this portion of the judgment of the District Court, which he has no power to do. Appellants cite the following quotation from 50 C.J.S. "Judgments" § 735a as definitive:

5/ The doctrine of res judicata is a judicial doctrine, and its application to administrative adjudications has been the source of some difficulty. See, e.g., Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir. 1963); cert. den., 375 U.S. 822 (1963). It has been held by some authorities that the doctrine does not apply at all to administrative proceedings, whereas others assert that it is fully applicable to some administrative determinations. 2 Davis, Administrative Law Treatise, Chap. 18. The administrative application of the principle of res judicata, where appropriate, has resulted in the evolution of what is described as its "administrative counterpart," known as the "doctrine of administrative finality." In light of our holding that these proceedings are not barred by past events, we need not further analyze these distinctions.

> Where title to, or rights or interests with respect to property or with respect to real property . . . is directly put in issue . . . the judgment is conclusive thereon in all further litigation between the same parties and their privies, whatever may have been the nature or purpose of the action in which the estoppel is set up; and the same is true of rights, title, or interests which by necessary implication must have been determined in the prior action in order to warrant or justify the judgment therein rendered. In such cases, the judgment is effectual as a release or confirmation by one party to the other; its estoppel constitutes a part of the title, and runs with the property, extending to all who are privies in estate to either of the parties. (Emphasis altered.)

However, appellants neglected part b. of that same section, which reads, in pertinent part, as follows:

> Where the question of right or title was not directly in issue and determined in the former suit, or was not necessary to the decision * * * the judgment is not conclusive even where the same property formed the subject matter of the two suits, * * *

The validity of the claims (hence the "right" or "title thereto") was not directly in issue in the prior condemnation, nor was it in anywise necessary for the Court to decide that issue, as the parties did no more than present the Court with a stipulated schedule of compensation payments which the Court, on approval, reduced to judgment. (See further discussion of the effect of the judgment regarding collateral estoppel, infra.).

This Board decided a virtually identical case, involving the same issues, in United States v. Martin, 9 IBLA 236 (1973). In that case this Board held:

> A civil action in a federal district court condemning a mining claim for a leasehold by the Department of the Navy is not res judicata to a subsequent contest challenging the validity of a claim prior to the condemnation. (Syllabus)

Accordingly, we hold that the doctrine of res judicata does not constitute a bar to this administrative proceeding ordered by

the District Court to determine the validity of the claims. See United States v. U. S. Borax Co., 58 I.D. 426, 430 (1943), and authorities cited in fn. 1 thereof.

[2] Appellants' second contention is that the Government is estopped to assert the invalidity of the claims by its prior "determination" that they were valid, the reliance on that determination by appellants, and the prejudice to their position caused by the passage of time, the death of witnesses and the loss of evidence. They also maintain that the District Court's judgment awarding compensation for the taking operates to estop further inquiry by the United States. 6/

First, as we have seen, there was no "determination" that the claims were valid. There was merely a report by a field examiner that in his opinion the claims were valid. The Assistant Secretary, in his letter to the Secretary of War, simply noted that such a report had been made. Granted, the Government then proceeded with the condemnation as though the claims were valid, but this Department's decision not to initiate a proceeding to test the validity of the claims at that time cannot be equated with a formal adjudication by the Department that the claims were valid. Moreover, the election of the Department to treat the claims as though they were valid for the purpose of condemning a temporary easement thereon did not operate to the disadvantage of the mining claimants. It should be borne in mind that in 1943 it was anticipated that the Government's need of this land was only temporary, and that after the war the lessee would again have the opportunity to resume his activities on the claims. See Ex. E, p. 7. The claims appeared to represent a good prospect, and Kraemer's report suggests that the Government examiners were favorably impressed with the lessee's sincerity, industry, and cooperation, and recognized that his temporary exclusion from the property worked a hardship on him and the claim owners. No doubt it was considered unnecessary, uneconomic and unduly burdensome to initiate contest proceedings to determine the claimant's possessory title just to acquire the use of the land for a short term. This forebearance on the part of the Government

---

6/ Thus, appellants are asserting both defenses of "equitable estoppel," based upon the past conduct of the Interior Department with respect to these claims, and "collateral estoppel" or "estoppel by judgment," based on their contention that the District Court has already decided the issue in their favor in the course of rendering its judgment on a related issue.

should not bar it forever from undertaking a determination of the validity of the claims, particularly since it redounded to the disadvantage of the United States and to the advantage of the claimants. For thirty years they have received payment in amounts they themselves agreed to, without doing any work or expending any money. However, appellants argue that if the claims be lost now because witnesses have died and physical exposures of ore have been covered over in the interim, their position has been ultimately prejudiced.

Our study of the record does not reveal any substantial support for appellants' contention that their case has been prejudiced in this manner. First, the preponderance of the evidence is that there has been very little change in the physical condition of the claims and the workings thereon, and what change has occurred is insignificant. For example, John Goldenstein testified concerning a joint examination he conducted with the contestees, as follows (Tr. 47):

> A. Well, we arranged for them to go a weekend and I think Mr. Sedillo said if we wanted one day, two days, three days, they could have brought shovels with them and dug them out. The drift was open and the workings on No. 2 was open. They weren't -- the only place that they felt there was any material that had filled up was in the bottom of the lower cut on Sam Hall 3. And they said the ore had been extended up four (4') feet, and part of that was still exposed.

During cross-examination Goldenstein was shown a copy of Walter's 1946 report of his examination of the claims, and the following colloquy ensued (Tr. 63):

> Q. Doesn't he [Walters] state that the vein can be traced along the outcrop for sixteen hundred (1,600') feet by means of shallow open cuts?
>
> A. That's what he states.
>
> Q. Now, you didn't make any shallow open cuts, did you?
>
> A. No. And if he had I'd have seen them.
>
> Q. You did not find any that he made?
>
> A. No.

Q. Do you feel that in thirty (30) years they might not have filled up with dirt?

A. No, they wouldn't have. This -- not in the dry desert country, they don't.

A. B. Fleming testified that his brother staked the claim and that he had looked at them in 1942, and had returned with John Goldenstein recently and found that the roadway and some cuts he remembered had been completely washed out. 7/ But the points he was referring to were not on the mountain; "its just right up the middle of that arroyo." (Tr. 118). However, with respect to the cuts which were said to have gone over the top of the mountain and established the continuity of the vein, Mr. Fleming had no knowledge (Tr. 119):

Q. Were there any cuts, to your knowledge, made on up over the top of the mountain to try to see if the vein was continuous with the west side?

A. I don't recall whether they were or not. I wasn't in there very often, only just to take the supplies and come back. I had a business down in Chamberino, New Mexico and a post office and I had to get in and get out right quick.

He did testify that he showed Goldenstein a cut "on the west side there" where, he said, "the ore is buried at least six or eight feet under that edge." (Tr. 129). This apparently refers to the same cut on the Sam Hall No. 3 to which Goldenstein had reference in the testimony quoted above from Tr. 47.

Mr. Fleming's testimony is the only evidence of changed conditions, and we are of the opinion that such changes as have occurred are of scant significance and did not prejudice the contestees' case.

As to the unavailability of witnesses who knew the condition of the claims in 1942, it does not appear that appellants are at any greater disadvantage than the Government. For one thing, as we

---

7/ However, Kraemer's 1943 report indicates that the road was washed out even then, saying:

"The 1 1/2 mile portion of this road which is in the canyon is now almost completely washed out and presented some difficulty in the Army jeep used by the examining party. The remaining 4 miles are in fair condition with the exception of one washed-out section which would be difficult to cross in an ordinary car."

have seen, those conditions are not significantly changed. For another, apparently none of the federal mineral examiners (Mackel, Kraemer, McGill, Walters) who inspected the claims in 1943-46 are available. It is pure conjecture to speculate whether the testimony of these and the others who had knowledge of the claims would have more greatly benefitted the contestant or the contestee.

In United States v. Martin, supra, appellant likewise asserted defenses of equitable and collateral estoppel, which were rejected by this Board. The elements of equitable estoppel require in this instance that some agent of the Government who was authorized to declare the claims valid should have falsely misrepresented to or concealed material facts from the appellants concerning the validity of these claims with the intention that the appellants should act upon it, with the result that appellants were thereby induced to do so to their ultimate damage. See Utah v. United States, 284 U.S. 534, 545 (1932); Cramer v. United States, 261 U.S. 219, 234 (1923); Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960); Fogle v. Hal B. Hayes & Associates, Inc., 221 F.Supp. 260, 264 (D. Calif. N.D. 1963); cf. United States v. Georgia-Pacific Co., 421 F.2d 92, 95-97 (9th Cir. 1970); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973).

First, it has not been shown that any authorized officer of the Department of the Interior ever informed the appellants, falsely or truly, that the Department had made a final determination that the claims were valid. Next, even assuming that this had occurred, or that the appellants believed it had occurred, it is not alleged that this would have been done to induce them to take the position that they have taken, or that they could and would have acted otherwise had they known that the claims remained subject to contest. Finally, they have not shown that if the Department misrepresented or concealed the facts, and if, knowing the true facts, they would have acted otherwise, that this resulted in their being damaged, or what such damage might be. They have received appropriate compensation for the use of the land as though the claims were valid. The only other course of action the appellants might have taken which could possibly have been calculated to further enhance their benefit from the ownership of these unpatented claims would have been for them to apply for a patent. Nothing that the Government has done, or is alleged to have done, prevented appellants from following this course. Indeed, if they believed that the Department had made a final determination that the claims were valid, as they say, this would have been the indicated action. Only if the validity of the claims remained subject to question would prudence have dictated that appellants do as they have done, i.e., accept the annual payment and take no action. Therefore, we hold that equitable estoppel is not recognizable in this case.

[3] Collateral estoppel would bar these administrative proceedings only if the rendition of the judgment of the District Court in the 1946 condemnation action necessarily required the Court to determine that the claims were valid in order to fix and award the schedule of rentals to be paid as compensation. Had this been a taking of the claimants' entire interest, so that the award of the compensation to the claimants would have had to represent the value of the land itself, then a finding by the Court of the claims' validity might be implied in its judgment. But this was not the case. The suit concerned only the temporary taking of whatever possessory right the claimants held in these unpatented mining claims. Every claimant of a claim located under the general mining laws is presumed to have certain possessory rights in his claim, which he enjoys unless and until the claim is formally held to be null and void in a lawful proceeding. Since, in this case, there had been no adjudication that these claims were null and void, the claimants had the right to occupy and possess them for the purposes recognized by the law. It was the temporary taking of this right which was compensated by the District Court's award in 1946, and no other. In making this award it was wholly unnecessary for the Court to adjudicate the issue of whether the claims were valid or not. It was only necessary for the Court to find that these unpatented claims existed and that they were held by the persons named in the litigation.

Collateral estoppel operates to prevent relitigation of issues actually litigated between the same parties in a suit on a different cause of action. V & S Ice Machine Co. v. Eastex Poultry Co., 437 F.2d 422, 425 (6th Cir. 1970); Harrison v. Bloomfield Bldg. Industries, Inc., 435 F.2d 1192, 1195 (5th Cir. 1971); United States v. Burch, 294 F.2d 1, 5 (5th Cir. 1961). If the second suit between the same parties is on a different cause of action, only those matters actually litigated and determined in the first action are conclusive in the second suit under the doctrine of collateral estoppel. United States v. General Electric Co., 358 F. Supp. 731, 738 (D. N.Y. 1973).

[4] Accordingly, we find that this administrative proceeding to determine the validity of these claims, which was ordered by the District Court in acknowledgement of this Department's special jurisdiction in such matters, as articulated in Cameron v. United States, 452 U.S. 450, 459-64 (1920), and Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963), is not barred by res judicata or by equitable or collateral estoppel.

[5] Finally, we agree with the holding by Judge Mesch that the claims were not valid in 1942 when the lands were withdrawn from the operation of the mining law because no discovery of a valuable mineral deposit was made within the boundaries of any of them, and they remain unsupported by any such discovery.

With the sole exception of Walters, none of the experts who examined the claims reported that a profitable mining operation could be anticipated on the basis of what is known of these deposits. Kraemer expressly found to the contrary in 1943, as did Goldenstein and Kelley in 1974, and Beckley would only recommend additional exploration on the basis that there is a possibility that such a program might reveal an ore body worth mining. Walters' 1940 finding that the existing exposures could be mined "at a small profit per ton" was based upon premium wartime prices and bonuses. However, the land was withdrawn in January 1942. Where a mining claim occupies land which has subsequently been withdrawn, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as of the date of determination. If the claim was not supported by a qualifying discovery of a valuable mineral deposit the land embraced within its boundaries would not be excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit subsequently increased due to an increase in the market value of the mineral. United States v. Henry, 10 IBLA 195 (1973). There is no showing in Walters' 1946 report that the price incentives upon which his finding depended were in effect on January 20, 1942, when the withdrawal was imposed and, absent such a showing, his report is not relevant to the issue of the claims' validity on the date of withdrawal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Martin Ritvo
Administrative Judge